No. 12,069

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

F. K. DENT, *Appellant,*

v.

ALASKA PLACER COMPANY, *Appellee.*

Appeal from the United States District Court for the Territory of Alaska, Second Division.

BRIEF FOR APPELLEE.

MABEL WALKER WILLEBRANDT,
Title Insurance Building,
Los Angeles, California,
Shoreham Building,
Washington, D. C.,
Attorney for Appellee.

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BRIEF FOR APPELLEE.

I.

JURISDICTION.

Upon a Complaint in ejectment, and application for a temporary Restraining Order pending trial of the action, filed by Plaintiff on August 12, 1948 in the District Court for the Territory of Alaska, Second Division, and pursuant to Order to Show Cause, pleadings, affidavits, and proceedings had thereunder, the said District Court, on September 7, 1948, denied said injunction pendente lite (R. 56-66). The

said District Court had jurisdiction to deny plaintiff's application for injunction pendente lite. (48 U. S. C. 110.) 28 U. S. C. 1948 Judiciary and Judicial Procedure Sec. 1357.

Appeal was allowed within thirty days from the District Court's order denying injunction pendente lite (R. 66-70). This Court has jurisdiction to hear an appeal from this interlocutory order. (28 U. S. C. 225 (b), and 227.) 28 U. S. C. 1948 Judiciary and Judicial Procedure 1292, 1294(2).

II.

STATEMENT OF THE CASE.

Facts.

Defendant, an Alaskan corporation, obtained from the U. S. Department of the Army, Corps of Engineers, a non-exclusive permit, revocable at will, but otherwise valid to December 31, 1950 (R. 26-30), authorizing Defendant "to dredge for gold in Niukluk River," southeasterly from Council Alaska (See shaded portion of map, R. 31).

Pursuant to such permit, during the latter part of the open mining season of 1947, Defendant floated its dredge to a patented mining claim held by Defendant under lease, to wit, L. & A. Bench, U. S. M. S. 1152, and prepared, in conformity with the Act of August 8, 1947 (R. 23-6), to mine the bed of the navigable stream, Niukluk River. (See Appendix to brief.)

During all of the open mining season of 1948, Defendant operated said dredge in the bed of the Niukluk River pursuant to said Act of August 8, 1947, and in accordance with the Regulations promulgated under said Act by the Department of the Interior, Bureau of Land Management, as set forth in Circular No. 1667 (R. 33-36; see also R. 39-40).

Plaintiff was at all times fully informed of Defendant's operations, and on September 23, 1947 notified Defendant that he, too, had a permit obtained from the U. S. Department of the Army, Corps of Engineers, to dredge for gold in the Niukluk River, said permit having allegedly been issued February 11, 1946 (R. 53).

Plaintiff has at no time used said permit, nor has he dredged, or attempted to dredge, the bed of said River (R. 40), although he has the right to do so, the privileges granted by the War Department, Army Engineers, and by the Regulations of the Department of the Interior (Cir. 1667), being non-exclusive (R. 34).

Plaintiff, on August 12, 1948, filed an action in ejectment against Defendant, asking for an injunction pendente lite (R. 2-7).

Plaintiff bases his right to such injunction on his alleged ownership "in fee", and "right to exclusive possession" of certain placer mining claims, "over and across" the bed of the Niukluk River (R. 2-5; see also shaded portion of map. R. 31). Plaintiff's claims, by their description (R. 3-5), appear to lie wholly within the bed of the Niukluk River.

All these claims were staked by Plaintiff's predecessors, the earliest date given, being 1933, and the last, May, 1938 (R. 9).

Plaintiff obtained said river-bed claims by a purported warranty deed dated March 17, 1946, from Clyde Glass and Violet Glass (R. 17), having also received in 1942, a quit-claim deed from F. P. Durocher (R. 49), and others.

Prior to the alleged grant to Plaintiff, the United States of America brought an action entitled United States v. Lucas et al., against certain defendants, including the said Clyde Glass, and including also this defendant, to enjoin them, and others, from mining in the bed of the Niukluk River. A judgment in said action was entered September 29, 1941, ordering that the said Glass (and others)

> ". . . are hereby barred from mining . . . the bed of the Niukluk River below the line of ordinary high water . . . until such time as legal authority so to do is secured by said defendants from the sovereign owner of said herein described real property.
>
> "It is Further Adjudged and Decreed that the United States of America is the holder of all right, title and interest in and to the bed of the Niukluk River . . . and that Nels Swanberg, Sr. . . ., Clyde D. Glass, and John L. Ost, as riparian owners of mineral claims do not, by virtue thereof, acquire any right,

title or interest in or to the soil or the values therein below the line of ordinary high water, it being specifically declared that the above portion of the Niukluk River is a part of the navigable waters of the Territory of Alaska." (R. 20-22; See also R. 57)

Plaintiff has at all times been fully informed of the above mentioned decree of court (R. 53), but, in disregard of it, he claims the bed of the Niukluk River below ordinary high water, "in fee" (R. 2), and claims that he is entitled to its "sole and exclusive possession" as "owner" (R. 7; 47; 52; 53), save as to the United States of America, by virtue of the "claims" staked out in said river-bed by his predecessors, Clyde Glass et al, and the transfer to Plaintiff of such title as the said Clyde Glass and others had to such claims (R. 9).

In addition to Plaintiff's alleged sole possession and ownership of the Niukluk River bed, plaintiff also rests his demand for an injunction pendente lite on the further ground that his "possessory rights" are in conformity with "Miners' Rules." (R. 44-6). These alleged rules were adopted at a meeting at Council, Alaska, on June 29, 1948 (R. 44). Plaintiff F. K. Dent, delivered an unsigned "Notice of Miners' Meeting", dated June 28, 1948, for a meeting the following day (R. 54). Mr. Clyde Glass, Defendant in the above mentioned suit by the United States of America, nominated Plaintiff as Chairman (R. 44). Nels Swanberg Jr., son of a defendant in the above mentioned suit by the United States of America, acted as Secretary (R. 46). The so-called "Rules" which were adopted had been prepared by Plaintiff's lawyers (R. 55). These rules provided that:

Rule 1. The owner "of a valid placer mining claim embracing within its boundaries any portion of the bed of a navigable stream *shall have the exclusive right* * to prospect and mine" the bed of the stream; and

Rule 2. The owner of a placer mining location "abutting ordinary high water on the banks of navigable

* Wherever emphasis is used in this brief, it has been added by the writer.

> rivers *shall have the exclusive right to prospect and mine the beds of navigable streams* abutting such placer mining locations . . .''

Furthermore, the rules were made both retroactive and prospective in application (R. 45).

Sixteen voters adopted the ''Rules.'' These included Plaintiff, his wife, Mr. Clyde D. Glass, Plaintiff's predecessor in interest who had been ousted from ownership in, or mining the bed of the Niukluk River by the suit brought by the United States of America, Nels Swanberg Sr., another defendant, so ousted in said suit, Mr. Swanberg's son, Nels Swanberg Jr., and F. P. Durocher, another of Plaintiff's ''predecessors in interest.'' Six of those adopting the ''Rules'' were directly interested in the pending suit (R. 46; cf. names R. 38, 49-50). Three of those present, including Defendant's president, refused to participate in said meeting (R. 46).

After proceedings had pursuant to an Order to Show Cause, issued by the District Court on August 12, 1948, returnable on August 25, 1948 (R. 12-13), and, upon the facts adduced at the hearing thereon on August 31, 1948 (R. 48), and upon the above facts and allegations of record, the District Court, on September 7, 1948, rendered its opinion, and entered an order denying Plaintiff's application for an injunction pendente lite (R. 56-65).

Plaintiff appeals from said order.

III.

QUESTION PRESENTED, AND SUMMARY OF ARGUMENT.

Since it is the well settled rule that an application for an interlocutory injunction is addressed to the sound discretion of the trial court, it appears to appellee that there is but *one* question actually involved in this appeal, which, stated affirmatively, is as follows:

(1) It was not, under the facts in this record, an improvident exercise of the trial court's discretion to refuse

Plaintiff's application for an injunction pendente lite.

However, since appellant, in his opening brief, argues other questions, concerning the interpretation of Federal statutes, they will be considered, and answered, herein as additional issues, as follows:

(2) It has never been the intent of Congress, either in (a) the General Mining Laws (30 U. S. C. 21 et seq) or by (b) laws adopted for the government of the Territory of Alaska (Organic Act, Alaska, May 17, 1884, 23 Stat. 24), or in subsequent amendments thereto (Act of June 6, 1900, 31 Stat. 329, 48 U. S. C. 381; Act of August 24, 1912, 37 Stat. 512, 48 U. S. C. 21) to grant any *rights* to the beds of navigable streams and—

Since all the mining statutes provide that "rules and regulations established by the miners shall not be in conflict with the mining laws of the United States," the miners in a mining district of Alaska have no statutory authority or power to adopt rules governing "temporary", or any other kind of "rights to possession" of mineral deposits in the beds of navigable streams.

(3) It was not the intent of Congress, by the Act of August 8, 1947 (61 Stat. 916, 48 U. S. C. 381) to confer either title to, or possessory rights in the beds of navigable streams in Alaska.

This Act merely opened the beds of such streams to "exploration and mining subject to such rules and regulations as the Secretary of the Interior may prescribe," and

(a) This last 1947 Act, like prior Acts, limited any rules and regulations which miners might make to such as are not in conflict with the mining laws, and hence

(b) Congress did *not* intend to leave the rights of possession of beds of navigable streams in Alaska to be governed by miners' rules.

(4) Plaintiff never acquired, nor does he now have, any valid "fee title", "possessory right", or any other property right in the bed of the Niukluk River.

(5) Plaintiff's alleged claim of title to the minerals in the bed of the Niukluk River is not made in good faith.

(6) The miners' meeting in 1948 and the Rules adopted were under the control of Plaintiff and added nothing to his already invalid claim to the bed of the Niukluk River.

(7) The Trial Court properly construed the law and its denial of Plaintiff's application for an injunction pendente lite was in the exercise of a sound discretion.

IV.

ARGUMENT.

(1) Denial of Plaintiff's application for an injunction pendente lite was not an improvident exercise of the Trial Court's discretion.

The Supreme Court of the United States has stated the principles of law under which this appeal must be considered.

In *State of Alabama and Alabama Public Service Commission, Appellants* v. *United States of America, Atlantic Coast Line Railroad Company, Seaboard Airline Railway Company et al* (1929), 279 U. S. 229, 73 L. Ed. 675, the court said:

> "It is a well established doctrine that an application for an interlocutory injunction is addressed to the sound discretion of the trial court; and that an order either granting or denying such an injunction will not

> be disturbed by an Appellate Court unless the discretion was improvidently exercised. *Meccano* v. *John Wanamaker,* 253 U. S. 136, 141, 64 L. Ed. 822, 826, 40 Sup. Ct. Rep. 463; 2 High, Inj., 4th Ed. P. 1696. And see *Rice and A Corp.* v. *Lathrop,* 278 U. S. 509, ante, 480, 49 Sup. Ct. Rep. 220 (February 18, 1929). The rule generally to be applied in the exercise of that discretion, is stated in our recent decision in *Ohio Oil Co.* v. *Conway,* 279 U. S. 813, post. 972, 49 Sup. Ct. Rep. 256 (March 5, 1929).

The Ohio Oil Co. case was one where an injunction was sought to prevent the collection of an enlarged severance tax by the State of Louisiana pending a test of the validity of the law. The Supreme Court noted that:

> "The laws of the State (Louisiana) afford no remedy whereby restitution of the money so paid may be enforced, even where the payment is under both protest and compulsion."

and then, in vacating the order denying the injunction, stated the rule by which the Trial Court's discretion is to be measured, as follows:

> "Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be *certain and irreparable* if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to the opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by bond, the injunction usually will be granted."

In the case of Hannan v. City of Haverhill (1941 CCA1), 120 F. 2d 87, the court, after reviewing authorities, quoted with approval from *New York Asbestos Mfg. Co.* v. *Ambler Asbestos Air-Cell Covering Co.,* 102 F. 890, 891, as follows:

> "The granting of a preliminary injunction is an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it; and the

> decision of the court of first instance, refusing such an injunction, will not, except for very strong reasons, be reversed by this court."

and then applied the rule laid down by the Supreme Court, (p. 90):

> "In rare cases, an Appellate Court will reverse the Trial Court for refusal to issue an interlocutory injunction, as in Ohio Oil Co. v. Conway, 279 U. S. 813, 49 S. Ct. 256, 73 L. Ed. 972. In that case, if the collection of a tax of doubtful constitutionality were not restrained pendente lite, the injury to the moving party would be certain and irreparable though final decree should go in his favor, because the laws of the State afforded no remedy for restitution of tax moneys illegally collected. No such extreme case is presented here. On the record before us we cannot say that the district judge abused his discretion in denying an interlocutory injunction. The plaintiffs have never applied for a special permit and been refused; nor have they shown that such an application would be a futile gesture. Therefore it cannot be said that denial of an interlocutory injunction will work irreparable injury to the plaintiffs . . ."

So is it likewise true that no extreme case is presented here. Appellant has allegedly had a permit to float a dredge in the Niukluk River since 1946 (R. 53); he was well aware of the passage of the law of August 8, 1947 opening the bed of the Niukluk, and other navigable streams to mining, and aware also of the Regulations promulgated pursuant thereto on November 26, 1947, which required a notice of intention to mine, but which like the law, granted no exclusive right of possession to any one in the beds of such streams. He has had, and still has, the same rights under the Act of August 8, 1947 as Defendant, but he has not complied with the law and regulations. He refuses to conduct mining operations in the bed of the Niukluk River as a privilege, along with others. Instead, failing himself to mine within the terms of the law, he seeks to enjoin Defendant, who *is* dredging in conformity with law and regulations.

An injunction pendente lite is not a power of the court that he can invoke in such a case. He may not use it to assist him in holding others off of the bed of a navigable river, to which he has no valid claim, and to which he can obtain no patent under the Mining Laws of the United States.

Appellant shows no grounds for an injunction; he has not shown that he has attempted to mine the river-bed, or that Defendant has in any manner thwarted such attempt.

See: *Gaines Dry Cleaners, Inc.* v. *City of Chicago* (1941 C. C. A. 7), 123 F 2d 104; also, *Weiner et al* v. *National Tinsel Mfg. Co.* 123 F 2d 96; *Hannan et al* v. *City of Haverhill,* supra; *Carolene Products Co. of Litchfield, Ill.* v. *Wallace, Secretary of Agriculture et al* (1939 D. C.) 27 F. Supp. 110, per curiam opinion by Supreme Court, affirming order denying a temporary injunction 307 U. S. 612, 83 L. Ed. 1495; *Local Draft Board No. 1 of Silver Bow County, Mont. et al* v. *Connors* (1941, C. C. A. 9) 124 F. 2d 388; and *Wilson* v. *Byron Jackson Co.* (1937, C. C. A. 9) 93 F. 2d 572.

(2) It has never been the intent of Congress, either in the General Mining Laws, or by laws adopted for the government of the Territory of Alaska, or in amendments thereto, to grant any rights to the beds of navigable streams.

Congress has never definitely declared an intent to grant either rights of possession or title to the land underneath the waters of navigable streams of Alaska. Appellant can cite no such declaration. He argues it only from inference. The laws themselves, and their interpretation by the courts, deny such inference.

(a) *The General Mining Laws of the United States.*

Section 22 of the general Mining Laws (30 U. S. C. 22) provides that—

> "* * * All valuable mineral deposits in lands *belonging to the United States* * * * shall be free and open to exploration and purchase * * * under regula-

tions prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

From the above section it is clear that the policy of Congress has been to encourage exploration and development of the country's mineral resources (Heydenfeldt v. Daney etc. Mining Co., Nev. 1877, 93 U. S. 634, 23 L. Ed. 995), *but* such policy extends *only* to those lands which *belong to the United States.*

Tidelands and beds of navigable rivers have never, within the history of administration of the public lands by the the United States government been regarded as *"land belonging to the United States."* On the contrary, such lands belong to the State, or, if located in a Territory, they are held in trust by the United States for the benefit of the people of any State, or States, organized from such territory.

In the case of *Shively* v. *Bowlby,* Or. 1894, 14 S. Ct. 548, 152 U. S. 1, 58, 38 L. Ed. 331, the Supreme Court held that a mining location *cannot* be made on lands lying below the line of ordinary high tide and that the Department of the Interior is without any authority to grant any cession whatever as to land so located. Quoting from the opinion:

"This case concerns the title in certain lands below high water mark in the Columbia River in the state of Oregon; the defendant below, now plaintiff in error, claiming under the United States, and the plaintiffs below, now defendants in error, claiming under the state of Oregon; * * *

* * * * *

(p. 59) "Upon the acquisition of a territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several states to be ultimately created out of the territory.

* * * * *

"The United States, while they hold the country as a territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters. *But they have never done so by general laws;* and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interests of the people and with the object for which the territories were acquired, of leaving the administration and disposition of the sovereign *rights* in navigable waters, and in the soil under them, to the control of the states, respectively, when organized and admitted into the union.

"Grants by Congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, *no title or right below high water mark,* and do not impair the title and dominion of the future state when created; but leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the constitution in the United States.

In *U. S. v. Holt State Bank et al* (1926) 270 U. S. 49, 70 L. Ed. 465, 468, the court stated:

"But, as was pointed out in Shively v. Bowlby, 152 U. S. 49, 57, 58, 38 L. Ed. 349, 352, 14 Sup. Ct. Rep. 548, the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future states, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty of public exigency. It follows from this that disposals by the United States during the territorial period *are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.*"

(b) *Laws adopted for the government of the Territory of Alaska.*

The Organic Act of Alaska (Act of May 17, 1884, 23 Stat. 24) contained one provision from which appellant must be drawing his startling theory (see Appellant's Brief p. 13) that Congress *intended* to grant a right to mine to anyone *who had staked out an alleged claim, even in a navigable river-bed,* if it had been done "under any existing reasonable rules governing temporary possession of mineral deposits." The provision in the 1884 Act, on which Appellant's theory seems to depend, provides that,

> "* * * the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or *now* claimed by them, but the terms under which said persons may acquire title to said land is reserved for future legislation by Congress."

Manifestly such provision was for the benefit of "Indians or other persons" who had, *in good faith,* and *actually,* made use of the land, or had, prior thereto, asserted their claim. *Appellant does not so qualify.* Neither he nor his assignors had claimed the bed of the Niukluk River when the Act of 1884 was passed. The word in the statute is "*now* claimed by them," which means claimed as of 1884. The earliest date Appellant claims that the Niukluk River bed was staked is 1933 (R. 9).

The above quoted provision of the law was applied by this Court in *McCloskey* v. *Pacific Coast Co.* (1908, C. C. A. 9) 160 F. 794, where the trial court was upheld in granting a temporary injunction restraining the erection of a structure on tidelands fronting plaintiff's property because of its interference with the upland owner's free access to and from navigable waters to which his property was con-

tiguous. In the McCloskey case, this court cited *Shively* v. *Bowlby,* supra, and concluded (p. 797):

> "There can be no doubt, therefore, that the appellee, while *it had not the right to wharf out on the tide lands* in front of its property, was, if its land abutted the shore, entitled to free access to the navigable waters at all points in front thereof, and was entitled to an injunction against the erection of any structure on the tide lands, or in the water in front thereof, which would interfere with such access. Gould on Waters, par. 547; Lyon v. Fishmongers' Co., 1 App. Cas. 662; Shirley v. Bishop, 67 Cal. 543, 8 Pac. 82; San Francisco Savings Union v. P. G. R. Petroleum, etc., Co., 144 Cal. 134, 77 Pac. 823, 66 L. R. A. 242, 103 Am. St. Rep. 72."

Appellant herein does not seek to enjoin appellee from erecting a permanent structure in the Niukluk River, preventing free access from the river to upland claims. In fact, appellant asserts no rights to upland claims along the river. From the descriptions of the mineral claims to which appellant asserts "possessory rights" and a "fee title", all six of them lie *"in and across"* the *bed of the Niukluk River,* and are identified by an Initial Stake on the shore (R. 2-5).

Shively v. *Bowlby,* supra, was decided by the Supreme Court in 1894. Since the General Mining Laws were extended to Alaska by the Act of May 17, 1884,* the extension carried them, as construed. The *Shively* decision controls, therefore, the interpretation and application of those laws to the navigable waters in the Territory of Alaska, as well as to all other parts of the United States.

Certainly there is nothing in the Organic Act providing for the government of the Territory of Alaska, and extending to it application of the general mining laws of the United States, which authorizes appellant's assertion that "Congress intended to grant the right to mine to all persons presently in possession under any existing reasonable rule

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* See *Bennett* v. *Harkrader* (Alaska, 1895), 15 S. Ct. 863, 158 U. S. 441, 39 L. ed. 1046; *Meydnbauer* v. *Stevens* (D. C. Alaska 1897) 78 F. 787; *Price* v. *McIntosh* (1901), 1 Alaska 286; *U. S.* v. *Verrigan* (1905), 2 Alaska 442.

governing temporary possession of mineral deposits." Particularly not, since he thereby means himself as the person "presently in possession" of the bed of the Niukluk River!

The fact that perhaps at the time of the Organic Act (1884), miners in Alaska had staked claims in the beds of navigable rivers (perhaps then in good faith and in ignorance of the mining laws and their limitations), justifies no such statement.

The further fact that appellant only six years ago, laid claim to the bed of the Niukluk River (*not* in ignorant good faith, but in defiance of the proper limitation of the mineral laws) is poor support for his argument that Congress intended then, or intended by any later legislation, to protect his invalid claims!

There is nothing in the mining laws, in the regulations promulgated to carry them into effect, in the Organic Act, or in any construction placed upon these laws or regulations by United States courts which supports appellant's argument.

All authority is to the contrary.

(c) *Miners in Alaska have no legal authority to make rules affecting possessory or title rights to beds of navigable streams.*

It is true that mining laws have continuously recognized the necessity and/or convenience of miners, who often work in isolated areas, to make local rules and establish customs by which their mining operations and reports may be controlled. The absence of all statutory law regulating mining was the cause of the recognition of "Miners Rules." (*Morton* v. *Solambo,* 26 Cal. 527). These Rules cover such matters as recording of notices, making affidavits of labor, or the methods of making proof of discovery, especially where there is no recording district (see 48 U. S. C. 383). Often miners' customs in the use of names and terms in the descriptions of a claim have been approved. (*Peca* v. *Huddleston* (1915) 5 Alaska 241). But Miners' rules and customs must be the actual governing force in the district and *in*

effect, to give them legal standing. (*North Noonday Mining Co.* v. *The Orient Mining Co.,* 1 Fed. 522, 530). Where recording districts have been established, and mining interests have ready access to a District Land Office maintained by the Department of the Interior, miners' rules and customs fall into disuse, and thereby lose all force and effect. (Haws v. Victoria Copper Mining Company, 1895, 160 U. S. 303, 40 L. ed. 436, 441).

Never has it been within reasonable construction of any statute that miners within a mining district might, by having a meeting and adopting rules, *create* thereby an estate in mineral land, or a title of any kind, "possessory," "temporary," or otherwise. *If no such title could be obtained under the mining laws* a miner's meeting could not legislate it into existence.

If it were possible for a *valid* "claim" to be perfected to the land below the waters of a navigable river in Alaska, then, it might be argued with some plausibility that miners' rules or customs could be invoked to protect a "possessory right," pending the locater's perfecting his claim. But, since claims to such land are utterly void, no meeting of miners can adopt a rule to cure the fundamental invalidity. Rules having that object are in conflict with the higher law. and are therefore void.

(3) It was not the intent of Congress, by the Act of August 8, 1947, to confer either title, or possessory rights of any kind to the beds of navigable streams in Alaska.

This Act merely opened the beds of such streams "to exploration and mining." It was a *privilege* the Act offered, *not* a recognition of prior property rights, nor the grant of new ones.

That this is true is clearly shown, not only by the terms of the Act itself, but by the Committee Report at the time of its passage.

This report, *see U. S. Code Congressional Service, 80th Congress, First Session 1947, page 1666,* states:

"Explanation of the Bill

The purpose of this bill is to make possible exploration for and mining of gold and other precious metals in the beds of navigable streams in Alaska. Such exploration and mining are not permissible under existing law.

* * * * *

This bill would remedy the existing situation by extending the right to mine that now exists in bays, shores, and inlets, to navigable streams, subject to the jurisdiction of the War Department for the protection of navigation and the jurisdiction of the Interior Department for the protection of fisheries. Contained in this bill are safeguards aiding the Fish and Wildlife Service of the Interior Department to keep a constant check upon mining to make certain that the fish are not endangered.

The Delegate from Alaska has testified at hearings held before your committee that the people of Alaska desire enactment of this legislation. The Interior Department's report on this bill is favorable, with amendments, and is as follows:

Department of the Interior,
Washington, April 11, 1947.

Hon. Richard J. Welch,
Chairman, Committee on Public Lands,
House of Representatives.

My dear Mr. Welch: This is in further reply to your request of January 16 for a report on H. R. 174, a bill to amend section 26, title I, chapter 1, of the act entitled 'An act making further provision for a civil government in Alaska, and for other purposes,' approved June 6, 1900 (31 Stat. 321), as amended by the act of May 31, 1938 (52 Stat. 588).

I have no objection to the enactment of the bill if it is amended as I suggest. It should be noted, however, that the policy embodied in the bill is inconsistent with that previously established by the Congress.

The effect of the bill would be to subject the beds of navigable streams in Alaska to exploration for and mining of gold and other precious metals. Such ex-

ploration and mining is not permissible under existing law.

* * * * *

The beds of navigable rivers have been consistently held to belong to the States if not disposed of by the United States prior to statehood. In the continental United States, as well as in Alaska, it has in the past been the policy of the Federal Government to hold the beds of navigable rivers in trust for the future States. (See United States v. Holt Bank, 270 U. S. 49 (1925).) H. R. 174 would reverse this policy insofar as the precious metals in the riverbeds of Alaska are concerned, since it would permit the exploration for and mining of these metals, without compensation being paid for the benefit of the future State. As I have stated, however, this involves a policy question which is primarily the concern of the Congress.

* * * * *

I believe that *the bill should also state clearly that persons mining in navigable streams shall acquire no title to the stream beds* and that, upon the admission of Alaska as a State, any privileges or rights acquired under the bill with respect to mining operations in the beds of navigable streams shall be open to termination by the State and that these operations shall then be subject to State law. Such a clause would give protection to the interests of the future State, and at the same time would permit mining operations in the navigable streams at present.

* * * * *

Sincerely yours,

J. A. Krug,
Secretary of the Interior.' ''

The Secretary of the Interior indicated certain changes in the wording of the bill, all of which were substantially incorporated in the law as passed.

There is nothing in the wording of the law, or in the committee report with relation to its meaning or intent, to justify the argument advanced by appellant (Appellant's Brief, p. 23) that Congress "intended to *confirm existing claims,*" in the beds of navigable rivers.

It is submitted that the intent of Congress clearly revealed in its official report on the bill, is just the contrary. And if there be any ambiguity in the act, and we believe there is none, then the recommendation of the committee report to the effect that "persons mining in navigable streams shall acquire no title to the stream beds" is binding, and conclusive against appellant's claims.

Appellant makes much of the proviso in Sec. 2 of the Act, that "nothing in this Act shall be deemed to affect or impair any valid claims, rights or privileges, including possessory claims under the first proviso of Sec. 8 of the Act of May 17, 1884 (23 Stat. 26) arising under any other provision of law." He argues that Congress intended thereby to "*confirm*" existing possessory claims.

That is true, but the ones "confirmed" do *not* include appellant's claims! The claims confirmed are "*valid claims*" and "*possessory* claims under the *first* proviso of Sec. 8 of the Act of 1884", which is that Indians or other persons shall not be disturbed in the possession or enjoyment of lands actually used by them or claimed in 1884. Those were given validity by the Organic Act in 1884. Appellant's "possessory claim" does not fit the saving clause in the Act. The first proviso of Sec. 8 has been most often invoked to protect the possessory rights of an Indian family or tribe, even though another may have obtained the title of record. (See discussion, infra, p. 13)

(a) *This 1947 Act, like prior acts, limited the rules which miners might make to those not in conflict with mining law.*

Since the Department of the Interior has sole jurisdiction over tidelands, and its action thereon is final (see *Lewis* v. *Johnson,* 1902 1 Alaska 529), no Rules adopted by a miners' meeting can have the effect of modifying the Department's interpretation of the 1947 Act, or of changing the Regulations by which privileges of mining may be obtained under it.

(b) *Congress did not intend to leave the rights of possession of beds of navigable streams to be governed by miners' rules.*

The 1947 Act, like prior acts, provided for the promulgation of Regulations by the Secretary of the Interior. Also, this last statute, like prior ones, recognizes that in appropriate cases miners might make rules if not in conflict with the law or regulations. Conceivably, miners' rules might be needed and in force as to matters properly within the control of miners in some inaccessible district. The statute recognizes that *possibility.* Even *if* miners rules were contemplated as possibly governing "exploration and mining" of land below the line of high water mark of navigable streams, which we believe was not the intent, the 1947 statute limited such miner's authority to just "*until otherwise provided by law.*"

Regulations, duly promulgated have the force and effect of law. They set up the steps whereby the privileges of river-bed mining may be exercised, e.g., *by special notice.*

Regulations under the 1947 Act were promulgated November 26, 1947.

The miners "meeting" on which appellant relies was not held until June 28, 1948.

Hence, if Miners Rules could have had any applicability under the 1947 amendment, these were adopted too late, *after Regulations were in effect.*

Furthermore, as the Trial Court pointed out (R. 60), Appellant's "claims", and all the Niukluk River involved herein have been under the *Cape Nome Recording Precinct,* and miners rules have long been discontinued in that area. They are no longer in force and effect.

(4) Plaintiff never acquired nor does he now have any valid fee title, possessory right or any other rights to the bed of the Niukluk River.

The principle that no one can obtain a valid title to navigable waters has become settled in the decisions of this court. In 1908, in the case of *Decker* v. *Pacific Coast S. S.*

Co., 164 F. 974; this court quoted from the earlier case of *Columbia Canning Company* v. *Hampton,* 161 Fed. 64, as follows:

> "It follows, from these authorities, that while the owner or locator of lands in Alaska which border upon navigable or tidal waters has, under the general law, the right of access to such waters for the purpose of navigation, *he can acquire no right or title to the soil below high-water mark, and he can have, therefore, no right of possession* upon which he can base an action against an intruder whom he charges with interfering with and obstructing him in the erection and use of a structure upon the shore below such high-water mark."

"The court said further:

> "He may have, however, a right of action against an intruder who places obstacles on the shore that prevent him from having access to the navigable waters."
>
> "This is the general rule, and is designed to keep navigable waters free and open to the public for commerce and navigation, and at the same time permit the littoral owner and those engaged in commerce and navigation to have access to navigable waters . . ."

(5) Plaintiff's alleged claim of title to the minerals in the bed of the Niukluk River is not made in good faith.

It has long been a practice of the United States in weighing rival claims to recognize, even in the absence of a full compliance with the law the prior claimant who has maintained continued occupation *in good faith* (Act of May 14, 1898, c. 299, p. 10, 30 Stat. 413, 48 U. S. C. 463).

This record reveals no basis of good faith for appellant's alleged claim of an exclusive "possessory right" in the bed of the Niukluk River.

The record shows that he knew of the ouster by the United States, of Glass and Nels Swanberg, from these Niukluk claims, in 1941; that he began taking deeds to Niukluk river-bed claims in 1942; that in 1946 he obtained

a "Warranty Deed" from Glass and his wife; that in 1947 when the law was passed extending the privilege, revokable, and non-exclusive, for any qualified person to mine the Niukluk River bed, he, learning of Defendant's plans to do so, served notice that he held that river-bed as his own, and would commence legal proceedings against anyone who attempted to mine it; that he well knew he could obtain the same privilege of mining the Niukluk as others; that he did not do so; that he let eleven months elapse and then filed this suit asking for an injunction pendente lite to restrain Defendant from further operations; that he knew the Secretary of the Interior had issued Regulations setting forth the steps necessary for anyone to claim the privileges accorded under the 1947 Act to mine the Niukluk legally; that seven months after such regulations became effective, he called a purported Miners' Meeting, had himself elected Chairman, and with the influence and votes of six directly connected with his claims, out of sixteen voters, he had "Rules," adopted denominated "Miners' Rules of Miners' Meeting, Council, Alaska," pretending to validate his "exclusive possessory rights," and that he presented such rules in an affidavit to the District Judge as authority for his claim of *exclusive* right to the bed of the River.

At all times Plaintiff knew his claims in the bed of the Niukluk River were invalid, but he acted in defiance of the law, with only one purpose, to wit: to prevent Defendant from using the privilege extended by Congress to any who might qualify under the law and Regulations to mine Navigable Rivers of Alaska.

(6) The miners' meeting and the rules adopted were under the control of appellant, and they added nothing to his invalid claims.

Reference is made to the statement of facts, pages 4 and 5, and to argument under IV (2) (c) pages 15 and 16 above.

(7) The Trial Court properly construed the law, and its denial of appellant's application for an injunction pendente lite was an exercise of sound discretion.

In Appellant's brief he twice alludes to the fact that the record does not show that Defendant filed the notice required under the Regulations of an Intent to Mine. Apparently he makes this statement as a sort of answer to two paragraphs in the court's opinion, (R. 61) namely:

> "The record fails to show that he (plaintiff) has filed with the Secretary of Interior the notice of intention to prospect or mine the bed of the stream."

and—

> "He (plaintiff) must depend upon the strength of his own title, and not the weakness of that of his opponent. * * * He has failed to show, either in his pleadings or his affidavits, that he has complied with the rules and regulations of the Secretary of the Interior . . ."

It is no answer to the court's findings, quoted above, for appellant to aver that the record does not disclose "that Defendant has ever filed any notice of intention to mine as required by the regulations of the Secretary of the Interior."

The court's order denying the injunction pendente lite was after a "hearing" (R. 48) and although the printed record does not contain a copy of it, appellant well knows that appellee *did* file a "Notice of Intention to Mine," and that the trial court knew it too.

Under the well recognized principle that this court may take judicial notice of Land Office Records (*Red Canyon*

Sheep Co. v. *Ickes,* 69 App. D. C. 27, 31, and *Fletcher* v. *Evening Star Newspaper Co.,* 72 App. D. C. 303, 308, 114 F. 2d 582) a certified copy of appellee's notice is hereto attached as an exhibit to this brief.

That appellant is wrong, and the trial court was right in construing the 1947 Act is shown by the case of *Heydenfeldt* v. *Daney* (1877), 93 U. S. 634, 23 L. Ed. 995, which presented the question of the proper interpretation of the mining laws of the United States. There, the court said:

> "It is true that there are words of present grant in this law; but, in construing it, we are not to look at any single phrase in it, but to its whole scope, in order to arrive at the intention of the makers of it. 'It is better always,' says Sharswood, Judge, 'to adhere to a plain common sense interpretation of the words of a statute, than to apply to them refined and technical rules of grammatical construction.' Gyger's Estate, 65 Pa. St. 312. If a literal interpretation of any part of it would operate unjustly, or lead to absurd results and be contrary to the evident meaning of the Act taken as a whole, it will be rejected; and there is no better way of discovering the true meaning of a law when there are expressions in it which are rendered ambiguous by their connection with other clauses, than by considering the necessity for it, and the causes which induced the Legislature to pass it. With these rules as our guide, it is not difficult, we think, to give a true construction to the law in controversy.
>
> * * * * *
>
> " * * * there are words of qualification in this grant. And these words restrict the operation of the words of present grant. If their literal meaning be taken, they refer to past transactions; but evidently they were not used in this sense * * * ."

The Heydenfeldt case was later applied by the Supreme Court in *Karnuth* v. *United States* (1929), 279 U. S. 231, 243, 73 L. Ed. 677, where it is stated:

> "The true sense in which the word was here employed will be best ascertained by considering the policy, necessity and causes which induced the enactment (citing cases)."

The "policy, necessity and causes" inducing the Congress to open the beds of navigable rivers to mining were to stimulate mining exploration, operations and business in the Territory of Alaska. The development of such business enterprises would help rather than hinder the establishment of a state, or states, out of that vast northern territory. The mining laws clearly recognize that the Federal Government holds beds of navigable rivers and tidal lands *in trust* for all the people, and to be ultimately administered by the state or states established in such territory. The policy of stimulating business in the territory is in line with such trust holding by the United States Government. The grant, or recognition of any fee title, or other "*rights*", in the nature of ownership of any kind in such lands, would be contrary to such trust holding. The law passed therefore in 1947 opening navigable river beds to mining operations should be construed in the light of the "causes which induced the enactment". Such an interpretation completely precludes any form of "ownership", "title", or "possessory right" in appellant. It likewise precludes the interpretation advanced by appellant for the reference in the statute to miners rules, as an intent by Congress to grant to miners in the district the right to decide questions of ownership in the beds of the navigable streams opened by the law to mining operations. The "causes which induced the enactment" of the 1947 statute compel the interpretation that the statute is limited strictly to extending a *privilege,* available alike to all who comply with the statute and regulations, rather than any recognition, confirmation or grant of a property right of any kind, possessory or otherwise.

CONCLUSION.

Appellant's application for an injunction pendente lite is without foundation since he has shown no threatened injury. (*Spielman* v. *Dodge,* 295 U. S. 89, 96). Appellant has set up no valid right or title, justifying his interlocutory

protection. His claims to the bed of the navigable Niukluk have no legal status. No Miners Meeting Rules can give them validity in any degree. Congress has given them no sanction in the 1947 Act. Appellant has presented no allegations or facts justifying the exercise of the emergency powers of the court in his protection.

It is respectfully submitted that the Trial Court's denial of an injunction pendente lite was right, and, under the principles of law announced by the Supreme Court of the United States, and by this Court, should be affirmed.

Respectfully submitted,

MABEL WALKER WILLEBRANDT,
Title Insurance Building,
Los Angeles, California,
Shoreham Building,
Washington, D. C.,
Attorney for Appellee.

Of Counsel:
C. C. TANNER,
Nome, Alaska.

4-207

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
GENERAL LAND OFFICE
WASHINGTON

APR 27 1949

I HEREBY CERTIFY that the annexed photostatic copies of letters filed under Miscellaneous Letter No. 10720, are true and literal exemplifications of the records on file in this office in my custody.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

Assistant Commissioner of the General Land Office.
Chief, Patents Section.

GOVERNMENT PRINTING OFFICE 6—7212

ONLY THE
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~~AIR MAIL~~

IN REPLY REFER TO:

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON 25, D. C.

AUG 28 1947

~~XIR GRAMTEM~~

To: Regional Administrator, Region VII, Anchorage, Alaska.

From: Director

Subject: Dredging for Gold in the Beds of Alaskan Navigable Streams.

This is in reference to your memorandum of August 22, transmitting a copy of a notice of intention to dredge in the Kiniluk River, filed by the Alaska Placer Company. You state that you have advised the Acting Manager at Nome to inform that Company not to start operations until regulations have been promulgated.

The recent Act of August 8, 1947 (Public Law 383, 80th Congress) authorizes the exploration and mining for gold, and other precious metals, in the beds of navigable waters of Alaska.

Pending the issuance of regulations under that Act, the appropriate district land offices are authorized to accept notices of intention to dredge and mine for such metals in the beds of navigable waters, provided the person filing the notice furnishes all of the information called for by 43 CFR, Cum. Supp. Sec. 69.13 (Circular 1454, February 17, 1939). There is therefore no need of delaying such dredging operations until such time as the new regulations are formally issued.

Copies of this memorandum are being transmitted to each of the three District Land Offices in Alaska.

Director.

cc: District Land Office, Nome
" " " Fairbanks
" " " Anchorage

OFFICIAL COPY

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

SEP 1 8 1947

Alaska Placer Company,
327 Colman Building,
Seattle 4, Washington.

Gentlemen: Attention: Ralph Lemon, Vice President.

Reference is had to your letter of August 27 concerning Public Law No. 383.

The act of August 8, 1947 (Public Law No. 383, 80th Congress) authorizes the exploration and mining for gold and other precious metals in the beds of navigable waters of Alaska.

Pending the issuance of regulations under the act the appropriate District Land Offices are authorized to accept notices of intention to dredge and mine for such metals in the beds of navigable waters provided the person filing the notice furnishes all of the information called for by Circular No. 1454 of February 17, 1939 (43 CFR Cum. Supp. Section 69.13). There is therefore no need in delaying dredging operations until such time as the new regulations are formally issued.

A copy of Circular No. 1454 is enclosed for your information. Copies of Public Law No. 383 are not available in this Bureau, but may be obtained from the State Department.

The matters presented in your letter of August 28 will be duly considered in connection with the preparation of the regulations.

Very truly yours,

Fred W. Johnson

Director.

Enclosure

LHD/jah 9/8/47

OFFICIAL COPY

4-207

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
~~GENERAL LAND OFFICE~~
WASHINGTON

APR 20 1949

I HEREBY CERTIFY that the ann[illegible]tostatic copies of papers filed under Nome 01018,

[illegible]

[illegible]true and literal e[illegible]cations of the originals on file in this office in [illegible]ody.

[illegible]MONY WHEREOF, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

Ian F. Horner

~~Assistant Commissioner of the General Land Office.~~
Chief, Patents Section.

GOVERNMENT PRINTING OFFICE 6—7212

Original 1 Given — Ser. No.
Feb. 2, '48
11 A.M. 01018

RECEIVED
U.S. LAND OFFICE
NOME, ALASKA
DATE SEP 10 1947
HOUR

ALASKA PLACER COMPANY.

Nome, Alaska, Sept. 8th, 1947.

District Land Office, under
Bureau of Land Management,
Nome, Alaska.

Supplemental Notice.

Dear Sir:-

Supplementing the notice of Alaska Placer Company, an Alaska corporation, filed in your office Aug.14th, 1947, of its intention to dredge for gold and other precious metals, in the bed of the Niukluk River, a tributary of Fish River, Cape Nome Precinct, Second Division, Territory of Alaska, under the provisions of Public Law 383 of Aug.8th, 1947, the Alaska Placer Company submits the following additional information:

The officers and directors of Alaska Placer Company, all native born citizens of the United States, together with their addresses, are as follows:

Carl J.Lomen, Nome, Alaska,	President.
Ralph Lomen, Seattle, Wash.,	Vice President.
F.Clinton Austin, Seattle, Wash.,	Vice President.
Everett P.Wood, Seattle, Wash.,	Secretary - Treas

All Seattle Addresses are %Colman Building, Seattle,4, Wash.

The dredging operations contemplated in the bed of said Niukluk River will commence opposite, and just below U.S.L.M. 1152, in Lat 64 degrees 53' N., Long.163 degrees 40' W and the proposed dredging area will approximate the shaded area as shown on the map attached herewith and made a part of this supplemental notice.

This information is filed in accordance with Sec.69.13 (2) of Circular No.1454, issued by the United States Department of the Interior General Land Office, Washington, D.C. and dated February 17, 1939.

This company expects to commence dredging operations this season, and as soon as its dredge can be placed on location.

Very truly yours,

ALASKA PLACER COMPANY,

by Carl J. Lomen

Carl J.Lomen, President.

5/3/48 Posted Vol 1 This Nome Oper 0
Minerals Page 71

Original 2

ALASKA PLACER COMPANY. Given - Ser. No. Feb. 12, '48 °01018

Nome, Alaska, Aug. 14th, 1947.

RECEIVED
U.S. LAND OFFICE
NOME, ALASKA
DATE AUG - 8 1947
HOUR AUG 13 1947

District Land Office, under
Bureau of Land Management,
Nome, Alaska.

Dear Sir:-

Please be advised that the Alaska Placer Company, an Alaska corporation, intends to dredge and carry on dredging and other mining operations in the bed of the Niukluk River, a tributary of the Fish River, Cape Nome Precinct, Territory of Alaska, under the provisions of Public Law ~~S.M.R.~~ 383 of Aug. 8th, 1947.

Such dredging operations will commence a short distance below the mouth of Melsing Creek, a tributary of said Niukluk River, close to U.S.L.M. No. 1152, and along and in front of mining locations embraced in Patent #1152, Ser. No. -24 (Min. Surv.) and dredging down stream from said point of commencement.

Such operations are expected to commence within a very few days.

Very truly yours,

ALASKA PLACER COMPANY,
by Dare J. Lomen
President.